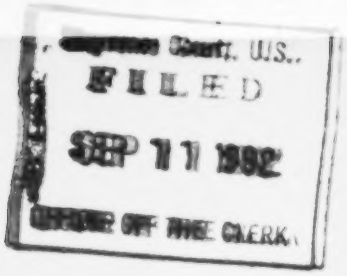
92-444



CASE NO. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

October 1992 Term

UNITED STATES OF AMERICA

Respondent

vs.

FRANK R. FATO, SR.

Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN G. JORY
Counsel of Record
JORY & SMITH
P. O. Box 1909
Elkins, WV 26241
304-636-3553

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in denying Petitioner his right to an appeal from a conviction in the United States District Court for the Northern District of West Virginia because Petitioner failed to report for sentencing and for service of his sentence, even though he voluntarily surrendered only four months later?

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STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner is seeking review of an Order entered June 16, 1992 by the United States Court of Appeals for the Fourth Circuit, wherein that Court denied Petitioner's Motion for Reconsideration of the denial of his Motion for Reinstatement of Appeal. Pursuant to Title 28 United States Code §1254(1) this Court has jurisdiction, by a petition for writ of certiorari to review the Fourth Circuit's decree.

CONSTITUTIONAL PROVISIONS, STATUES AND RULES INVOLVED IN THIS CASE

I. Amendment VIII, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

II. Amendment XIV, Section 1, United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. 28 United States Code, §1254(1), Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

IV. Rule 3, Federal Rules of Appellate Procedure

An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to

take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal...

STATEMENT OF THE CASE

Pursuant to an indictment captioned United States of America v. Frank R. Fato, Sr., Criminal No. 90-160, filed in the United States District Court for the Northern District of West Virginia on November 15, 1990, the Petitioner, Frank R. Fato, Sr., was charged with violation of Title 18, United States Code, §371 (conspiracy to defraud or commit an offense against the United States); Title 18, United States Code §1952(a)(3) and (b) (interstate travel in aid of racketeering); and Title 18, United States Code, §1343 (wire fraud). These charges arose out of an arson committed on property owned by the Petitioner and located in the State of Maryland.

After a three-day trial in which he denied any involvement, Petitioner was convicted on October 10, 1991, of those charges set forth in the November 15, 1990 indictment. Petitioner, having been released on a $10,000.00 unsecured bond, failed to appear for sentencing which was scheduled for January 6, 1992. Petitioner was sentenced in abstencia and subsequent thereto, a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit was timely filed by counsel on behalf of Petitioner on January 13, 1992. By correspondence dated January 27, 1992, counsel for the respective parties were advised that pursuant to Estelle, Corrections Director v. Dorrough, 420 U.S. 534, 537 (1975), it was the Circuit Court of Appeals' practice to dismiss the appeal of an escaped "prisoner" with leave to the appellant to move for reinstatement of the appeal at a future date for good cause shown. Thereafter, pursuant to an Order dated February 6, 1992, the appeal was dismissed with

leave to move for reinstatement at a future date.

On April 21, 1992, the Petitioner voluntarily surrendered to the custody of the United States and filed a Motion for Reinstatement of Appeal on May 1, 1992. The Government filed a response on May 11, 1992 and a reply was filed by the Petitioner on May 18, 1992; however, the Circuit Court of Appeals entered an Order on the same date denying reinstatement of the appeal without having an opportunity to review the reply. Therefore, Petitioner filed a Motion for Reconsideration, setting forth among other things, the fact that the two documents apparently crossed in the mail and that the circumstances set forth in the reply compelled a reconsideration of the Motion.

On June 16, 1992, a Deputy Clerk of the Fourth Circuit Court of Appeals entered an Order denying the Motion for Reconsideration. Neither the Order denying the Motion for Reinstatement nor the Order denying the Motion

for Reconsideration set forth any reason for the denial. Petitioner comes before this Court, on a petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit's denial of his right to an appeal from the October 1991 conviction.

ARGUMENT

The Fourth Circuit Court of Appeal's denial of the Petitioner's right to an appeal from his conviction in the Northern District of West Virginia based upon his failure to appear for sentencing was the result of an improper interpretation and modification of this Court's ruling in Estelle, Corrections Director v. Dorrough, 420 U.S. 534 (1975) wherein this Court upheld a Texas statute permitting the dismissal of an appeal by a felony defendant if he escaped from custody pending the appeal. The Texas statute also provided for reinstatement of the appeal if the defendant voluntarily surrendered within certain prescribed time periods and prisoners who had not invoked the appellate

process prior to their escape could appeal after recapture if applicable appellate time limits had not run.

In the instant case, Petitioner fled prior to sentencing, but a timely Notice of Appeal was filed by his counsel. Rule 3, Federal Rules of Appellate Procedure, provides in pertinent part that one convicted of a crime in a district court may appeal, as of right, to a court of appeals for that district. However, the Circuit Court of Appeals has instituted a policy, apparently based upon Estelle, whereby appeals are dismissed if the appellant has fled the custody of the United States or violated the conditions of his bond.

Although there was a specific Texas statute providing the basis for denial of an appeal in Estelle, there is no statute providing guidance or justification for the position taken by the Fourth Circuit. More importantly, the decision seems to be in conflict with a prior decision of that Court. In U.S. v. Sellers, 621

F.2d 101 (4th Cir. 1980) the Court reinstated the appeal of a prisoner who had escaped during the pendency of his appeal and remained a fugitive for approximately 27 months. In the instant case, Petitioner escaped prior to his appeal and only remained a fugitive from January 6, 1992, until his voluntary surrender on April 21, 1992.

Since the Orders do not disclose any basis for the Court's decision, it appears that the Fourth Circuit Court of Appeals may have accepted the Government's contention that the Petitioner had abandoned his right to an appeal. However, this is an impossible scenario because the Petitioner was never given the opportunity to pursue an appeal since he became a fugitive prior to commencement of the appellate process. Furthermore, to punish someone by prohibiting an appeal is unnecessary under our modern system of jurisprudence. Petitioner has already received two potential forms of punishment for his failure to appear for sentencing. Namely,

Petitioner received a 10 month enhancement of his sentence pursuant to Section 3C1.1 of the United States Sentencing Guidelines and he was indicted on April 14, 1992, for failure to appear for sentencing, a violation of Title 18 U.S.C. §3146(a)(1). Petitioner submits that those factors provide adequate punishment for his actions and the denial of his appellate right constitutes a violation of the 8th Amendment's prohibition against excessive fines and the infliction of cruel and unusual punishment, as well as being violation of the 14th Amendment's equal protection clause.

In U.S. v. Smith, 544 F.2d 832 (5th Cir. 1977), a case relied upon by the Government in its opposition to Petitioner's Motion for Reinstatement of his Appeal, Smith was denied his right to an appeal because he "jumped bond" while the appeal was pending. Unlike the Petitioner in the instant case, he had been given the opportunity to pursue his appeal and by his actions, abandoned the appeal. The

logical conclusion is that one must be given the opportunity to pursue an appeal before it can be abandoned. Accordingly, Petitioner ought to be permitted to pursue his appeal.

As set forth above, the Order dismissing Petitioner's appeal with the right to move for reinstatement did not refer to any particular statute or court rule. Furthermore, the Order did not provide for a specific time within which Petitioner must surrender as a prerequisite for reinstatement. The Order merely provided that the appeal could be reinstated at a later date for good cause shown. (Petitioner submits that good cause was established in his motions filed with the Circuit Court of Appeals.) The Fourth Circuit Court of Appeals has, however, provided specific time limitations pertaining to surrender in other cases. For example, in In Re: Special Grand Jury, 697 F.2d 112 (4th Cir. 1982), the Court specifically provided that reinstatement

would be granted only if the fugitive, appellant surrendered within thirty days.

The authority more directly on point is clearly United States v. Sellers, 621 F.2d 101 (4th Cir. 1980) wherein the Court allowed reinstatement after 27 months despite the fact that the Appellant fled during the pendency of the appeal. Petitioner submits that the purpose for dismissal in both Sellers and the instant case was for judicial economy. It would seem to be a waste of resources to institute an appeal which may ultimately result in a reversal and/or remand of the case when the Defendant is a fugitive. Upon surrender or capture, the appeal should be reinstated as occurred in Sellers. However, the Circuit Court of Appeals has chosen to disregard its own precedent and deny the Petitioner equal protection of the law as required by the Fourteenth Amendment to the United States Constitution.

In sum, the Petitioner was never given an opportunity to pursue his appeal, unlike

other appellants who have abandoned their right to an appeal by fleeing the jurisdiction during the pendency of the appeal. The Fourth Circuit's decision is in conflict with its own authority and is based upon an incorrect interpretation of this Court's authority. Furthermore, the appellate court's refusal to consider Petitioner's reply brief which was filed on the same day as the Court's order is a miscarriage of justice. Accordingly, this Court should consider this Petition for writ of certiorari and direct the Fourth Circuit Court of Appeals to reinstate the appeal.

CONCLUSION

Petitioner was improperly denied his right to appeal to the United States Court of Appeals from his criminal conviction in the district court. A writ of certiorari should issue so that this Court may review the entire record and remand the action with directions to reinstate the appeal.

Respectfully submitted,

FRANK F. FATO, SR.,
Petitioner

By Counsel

STEPHEN G. JORY
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Elkins, WV 26241
(304)636-3553

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

JOHN M. GREACEN
Clerk

TELEPHONE
(804) 771-2213
FTS 925-2213

January 27, 1992

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Samuel Gerald Nazarro Jr., Esq.
OFFICE OF THE U. S. ATTORNEY
P. O. Box 591
Wheeling, WV 26003

Re: 92-5046 US v. Fato
CR-90-160

Dear Counsel:

The appeal was docketed in this Court on 1/27/92 pursuant to Rule 12(a) of the Federal Rules of Appellate Procedure. Docket number 92-5046 should be placed on all papers subsequently submitted to this Court.

We have received notice from the District Court that the appellant, Frank R. Fato, Sr., failed to commence his prison term.

Pursuant to Estelle v. Dorrough, 420 U.S. 534, 537 (1975), it is this Court's practice to dismiss the appeal of an escaped prisoner with

leave to the appellant to move for reinstatement of the appeal at a future date for good cause shown.

Before the appeal can be dismissed, however, we must have confirmation from the government and appellant's counsel that the appellant has not been apprehended and is still at large. Once the confirmation is received, the appeal will be dismissed.

Counsel for both sides are requested to respond to this letter on or before February 6, 1992.

If you desire to inquire about your case by telephone, please contact me directly by dialing (804) 771-2359.

Yours truly,

JOHN M. GREACEN
Clerk

By: AMY M. CHURCH
Deputy Clerk

cc: Randy Belsvik

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 6, 1992

No. 92-5046
CR-90-160

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK R. FATO, SR.

Defendant - Appellant

O R D E R

The Court having determined that the appellant has escaped from custody,

IT IS ORDERED that the appeal is dismissed with leave to the appellant to move for reinstatement of said appeal at a future date for good cause shown.

FOR THE COURT - BY DIRECTION

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 18, 1992

No. 92-5046
CR-90-160

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK R. FATO, SR.

Defendant - Appellant

O R D E R

Appellant has filed a motion to reinstate this appeal and the government has filed a response in opposition to the motion.

The Court denies the motion for reinstatement of appeal.

FOR THE COURT,

/s/ Bert M. Montague

ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 16, 1992

No. 92-5046
CR-90-160

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANK R. FATO, SR.

Defendant - Appellant

O R D E R

Appellant has filed a motion for reconsideration of his motion for reinstatement of appeal and the government has filed a response in opposition to the motion.

The Court denies the motion for reconsideration of his motion for reinstatement of appeal

FOR THE COURT - BY DIRECTION

BERT M. MONTAGUE
Clerk